NO. 9269

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ERIK ENAR KRISTER LOVSKOG and SVANHILD SALLY VILHELMINA ABRAHAMSSON,

Appellants,

vs.

AMERICAN NATIONAL RED CROSS,

Appellee.

REPLY BRIEF OF APPELLEE

UPON APPEAL FROM THE DISTRICT COURT
FOR THE TERRITORY OF ALASKA
DIVISION NUMBER ONE

FRANK H. FOSTER,
KNIGHT, BOLAND & RIORDEN,
Attorneys for Appellee

SUBJECT INDEX

STATUTES CITED

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STATEMENT OF CASE

This case arises on appeal from a decision of the United States Commissioner, ex officio Probate Judge of Juneau Precinct, First Division, Territory of Alaska to the District Court of the First Divis-

ion, Territory of Alaska, which decision is set forth on pages 1, 2 and 3 of the Transcript of Record herein, upon which appeal a trial was had in the District Court above named, and a decision was rendered on the 15th day of July, 1939, by the Judge of the District Court, (Transcript of Record, pages 5 to 31 inclusive). Findings of Fact and Conclusions of Law were thereupon promulgated and a Decree was entered on July 24th, 1939. (Pages 31 to 35 inclusive Transcript of Record). By the aforesaid Decree, the Order of the Commissioner was reversed and Appellee herein was decreed to be the sole beneficiary and devisee under the Will of Gus or Gustav Lanart, deceased.

It is from the decision of the Honorable District Court above set forth, that this appeal is taken.

THE FACTS

The facts leading up to this appeal are set forth in the Memorandum of Decision of the Judge of the District Court and it is unnecessary for Appellee to repeat them here, more than to say that by the undisputed evidence there was found among the effects of Gustav Lanart, after his death, a memorandum book (Appellant's Exhibit 1, page 54 Transcript of Record). The text of this exhibit follows:

"After Death

Please forward all to Red Cross, (as i don't

think any relatives are alive,) the might be able to do some good with the ——— i have

Gambier Bay
Oct. 22, 1932
GUS LANART

Eagles aerie No. 1 Seattle will take care the burial

What is not mentioned in this will belong to PAF Bellingham the are the owners")

Exhibit No. 4 is a Violet Ray copy of Exhibit No. 1. Exhibit No. 3 is a letter from John Edgar Hoover, in which he states that the missing word is "little".

The testimony of the witnesses undisputed by Appellant herein, is to the effect:

1. That at the time of the making of the Will above set forth, Lanart was over the age of 21 years.

2. That at the time of the making of the will above set forth, Lanart was of sound mind.

3. That the Will is dated and is wholly in the handwriting of Gustav Lanart.

4. That at the time of his death Lanart was unmarried and had no children, or grandchildren.

FOREWORD

Inasmuch as the Honorable Judge of the District Court of the First Division, Territory of Alaska, has in his Memorandum Decision, (pages 5 to 31 inclusive, Transcript of Record), in an able and comprehensve manner set forth as grounds for his decision, the basis of Law supporting the same, we shall not attempt, except briefly, to answer Appellants' contentions; the Law cited by Appellant is undoubtedly correct in most instances, although inapplicable, in our opinion, to sustain his case. We will, however, endeavor to point out the fallacy of his argument in some respects.

FIRST POINT

The first question raised by Appellant is "Is the instrument sufficient to constitute a holographic will, or any will, under the law, regardless of the identity of the beneficiary?"

> "A will is commonly defined as any instrument executed with the formalities of law, whereby a person makes a dispositon of his property to take effect after his death." (28 RCL p. 58)

Inasmuch as the right to devise one's property by Will is not a natural right, but is wholly statutory, we must be guided by the Statute of the Territory of Alaska in determining whether or no the instrument in question is a will, the only Statute of the Terrtory of Alaska relating to holographic wills,

is found in Section 4624, Compiled Laws of Alaska, 1933, and reads as follows:

> "Holographic wills, with or without attestation, shall be admitted to probate the same as other wills and be proved in the same manner as other private writings."

There is no definition given in the Code and we must look to the General Law:

> "A holographic will, which in a number of jurisdictions is a recognized kind of testamentary instrument, is one entirely written, dated and signed by the testator in his own handwriting. - - - - -
>
> Aside from the requirements as to writing, date, and signature, a holographic will is subject to no other form. - - -
> It is sufficient if the writing expresses, however informally, a testamentary purpose in language sufficiently clear to be understood." (28 RCL Sec. 116, pages 161 and 162).

Appellants quote from Volume 28 RCL p. 211 to 214 in regard to the construction of Wills. All of the authorities are in accord with the rule as here stated. In order to constitute a valid will, the intent to make a will must clearly appear from the contents of the instrument, but in construing the will, it is not necessary to follow the words in the sequence of the will itself. The rule as stated in Section 187, p. 225, Vol. 28, RCL as follows:

> "In the construction of wills, words may be

> transposed, supplied or rejected where warranted by the immediate context or the general scheme of the will."

Appellants argue that the instrument in question is not a will for the reason that no particular property is devised. For the purpose of argument let us change the form of the wording to make more clear the purpose of testator:

> After death please forward all the little i have to Red Cross, (as i don't think any relatives are alive) they might be able to do some good with it.
>
> (Signed) Gus Lanart
> Gambier Bay
> Oct. 22, 1932

The **Animus Testandi** of Lanart is clearly shown from the will. He said "After death," intending thereby to devise his property for a definite purpose upon his decease.

Appellant argues that the word "all" is not sufficient to pass the estate. In Chamberlain vs. Owings 30 Maryland 447, the following appears:

"All I have," when used in a will is sufficient to pass the fee when such intention is manifest from the entire instrument.

It is further contended that "forward" is not sufficient to take the place of "give or bequeath." The rule as stated before with regard to holograph-

ic wills, is that no formality of expression is required but that the intent of testator must prevail. Lanart was an ignorant man, as clearly appears from the spelling of the instrument in question; that he used the word "forward" in the sense of transmit, as defined in Webster's Dictionary is undoubtedly true. The purpose for which his property was to be used after being forwarded or transmitted to Red Cross, was clearly shown by the words "they might be able to do some good with the little I have". It is also argued that the fact that Lanart did not keep his will in a safe deposit box, is proof that he did not intend it to be a will. Counsel for Appellant has evidently been misled by a series of decisions from States whose statutory requirements are to the effect that a holographic will to be valid, must be kept among the valuable papers of deceased. No such requirement exists under the Law of the Territory of Alaska and as is stated in RCL Volume 28, p. 165:

> "The place where a holographic will is put by the Testator, or is found is not generally considered material, but the Statutes of a few States require that such a will must be found among the valuable papers and effects of the deceased."

Appellant raises the question of the effect of the words "as I don't think any relatives are alive," it being suggested that inasmuch as the Testator was mistaken in this assumption, the will should be refused admission to Probate. On this point we submit the following authority:

In Riley vs. Casey, 185 Iowa, 461, 170 NW 472. (1919) the testatrix stated in her will that two of her children were excluded from her will because they had received certain benefits by a conveyance from their grandmother. The two children denied such a conveyance. Evans, Jr., stated:

> "A testator, of sound mind, may make a mistake and may act upon it in the making of his will to the detriment of a proper subject of his bounty, but the mere proof of such mistake will neither invalidate the will nor subject it to reformation."

In re Shumway's Will, 128 Misc. 429, 246 NY Supp. 178, (1930) involved a will which recites that as the testator has already made advances to the contestant during his life time, no further provision would be made by the will. The contestant denied any advances by the testator. The will was admitted to probate. The court stated that it could only effectuate the intention of the testator expressed in the will, and would not undertake to re-write a will in the light of what the testator might have intended had the mistake not been made. Wingate S. at page 184-185 says:

> "In the last analysis, the testator had an absolute right to divert his property from this contestant; he was under no obligation to assign any reason for so doing, and an inaccurate statement of a reason will not be held to invalidate the fee and voluntary testamentary directions of this competent testator."

There is some authority to the effect that a will will be denied probate because of a mistake, only when it appears what would have been the will of the testator but for the mistake. In Clifford vs. Dyer, 2 RI. 99, 57 Am. Dec. 708, the son of the testatrix was omitted from her will. He had been absent for some ten years and the testatrix told the scrivener that she believed him to be dead. The Court held that the will would have been the same had the testatrix known that the son was alive. However, Greene, C. J. Stated:

"But if this were not apparent, and she had made the will under a mistake, as to the supposed death of her son, this could not be shown **dehors** the will. The mistake must appear on the face of the will, and it must also appear what would have been the will of the testatrix had she not made the mistake."

The above approved in In Re Tousey's Will 34 Misc. 363, 69 NY Supp. 846. In this case the will contained a statement that deceased was unmarried and had no "direct heirs". A cousin who had not seen the testatrix for more than forty years, contested the probate on the ground that the testatrix had mistakenly supposed him to be dead and that as to him, she died intestate. The objection was overruled, and the will was admitted to probate. It was stated that even though the testator was actuated by erroneous opinions on questions of fact, the directions of the testator should be followed.

Also see 41 Harvard Law Review (1928) 209, 231.

Section 4639 CLA 1933, provides:

> "Construction of wills; testator's intention to be carried out. All courts and others concerned in the execution of last wills shall have due regard to the directions of the will and the true intent and meaning of the testator in all matters brought before them."

Under the clear provisions of the above Statute and decisions of many courts of competent jurisdiction, holding in accord with the same rule, we submit that the decision of the District Cour, Territory of Alaska, in reversing the order of the Probate Court was correct and should be sustained on the point that the instrument in evidence, Exhibit 1, is a valid will and is entitled to probate as such.

SECOND POINT

As his second point of argument Appellant urges the failure of testator to specifically name and identify the beneficiary under the will, in that he used the term "Red Cross", and that such designation is so uncertain that the American National Red Cross is not entitled to receive the estate of deceased.

The American National Red Cross Society was created under charter of Congress, 36 U. S. C. A. also found in 2 Fed. Ann. pp 59-64, and provides

among other things "To continue and carry on a system of National and International relief in time of peace, to accept bequests for such purposes".

In the case of "In the matter of the Estate of Theodore Engles, deceased. State of South Dakota appellant vs. American National Red Cross, respondent" reported in 245 Northwestern at page 399, the following appears:

> "Appellant urges the failure of testator to specifically name and identify the beneficiary in the residuary clause in that he used the term "Red Cross Society"; that the designation is so uncertain that it may mean the American National Red Cross of Washington ,D. C., or it may mean the local chapter of the Red Cross of which he was a member, and that it is therefore most likely that he wished to bestow the gift upon the local organization. Appellant further urges that the language is insufficient to pass the legal title to the property to the "Red Cross Society" in that he only used the words "give and bequeath" and failed to use the usual term "devise". An investigation of authorities as to what particular society testator had in mind seems to indicate that the word "Red Cross Society" means the National Organization. See American National Red Cross v. Felsner Post (1927) 86 Ind. App. 709, 159 NE 771. This belief is strengthened by the wording of the Congressional Act or charter creating the American National Red Cross 36 U. S. C. A., Paragraph 4 of said Act of Congress being as follows:

"It shall be unlawful for any person * * * to use within the Territory of the United States of America and its exterior possessions the emblem of the Greek Red Cross on a white ground, or any sign or insignia made or colored in imitation thereof, or of the words, 'Red Cross' or 'Geneva Cross' or any combination of these words.

It would therefore seem that there is some presumption at least when one speaks of Red Cross of the Red Cross Society that the speaker when not limiting and specifically pointing the fact that he has in mind a different organization such as a local chapter, that he means the American National Red Cross. If it were the wish of the testator to bestow upon the Wakonda branch of the Clay County chapter of the Red Cross it is quite natural that he would have used appropriate language to refer directly by name or in some suitable way of designating the local chapter or organization. We feel that the learned trial court was fully justified under the evidence in so finding that we are not warranted in disturbing his findings and conclusions as to the intention of the testator."

R. C. L. Volume 28, Section 172, page 210, reads as follows:

"The doctrine early became crystallized as a part of the common law of England that gifts to charitable uses should be highly favored and construed by the most liberal judicial rules rather than that the gift should fail, and the intent of the donor fail of accomplishment. Charitable bequests are therefore

> liberally construed to carry into effect the intention of the testator, and every presumption with the language used will be indulged to sustain them."

In view of the foregoing authorities it would seem clear that the American National Red Cross is the proper appellation of Red Cross as stated in the will of Gustav Lanart, and that the Honorable District Court of the First Division, Territory of Alaska, made no error in so finding.

THE HEIRS

On p. 3 of Brief of Appellants, the following appears:

> "No question is raised herein as to the fact that the appellants are the sole surviving heirs-at-law of deceased and entitled to the property of the estate if the document in question is not a will."

In the order of the United States Commissioner ex officio Probate Judge, which was reversed by the District Court of the First Division, Territory of Alaska, from which last named decision this appeal is being taken, the following appears, (Transcript of Record p. 3):

> "It is hereby decreed that Erik Enar Krister Lovskog and Svanhild Sally Vilhelmina Abrahamsson, a brother and sister of the deceased, are legally the sole heirs."

An examination of the record of the case appealed from herein, will fail to disclose any exhibits, testimony or offers of testimony showing any connection or relationship between Appellants herein and Gus or Gustav Lanart, deceased.

In the absence of proof of heirship in the District Court we are at a loss to understand how this appeal could be maintained in any event.

CONCLUSION

Under the law and the facts as heretofore stated, we believe that the decision of the Honorable District Court of the First Division, Territory of Alaska should be affirmed.

Respectfully submitted,

FRANK H. FOSTER,

KNIGHT, HOLLAND & RIORDAN

Attorneys for Appellee.